No. 82-1671

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION

Petitioner,

v.

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN BAKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

STATEMENT OF INTEREST[1]

The American Bakers Association (hereinafter "ABA") is a trade association whose 250 members produce approximately 80% of the baked food products consumed in the United States. The ABA is comprised of large nationwide companies, regional bakers, and independent local baking companies. The members of the Association negotiate numerous multi-employer collective bargaining[2] agreements with various labor organizations representing their employees. The ABA, through its Industrial Relations Committee, collects and disseminates industry-wide collective bargaining data, participates in a productivity project with the American Productivity Center and engages in a variety of consultive functions in connection with the negotiation and administration of collective bargaining agreements in the baking industry. In many instances, the ABA has represented the baking industry before federal agencies and Congressional committees on issues applicable to a major portion of the industry. ITT Continental Baking Company, Inc. (hereinafter "ITT Continental"), is a member of the American Bakers Association.

The ABA is concerned that the decision of the Court of Appeals will destabilize labor relations in that substantial portion of the industry with a tradition of multi-employer

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[1] The American Bakers Association amicus brief is submitted with consent of the parties. Communications permitting this brief have been filed with the Clerk of the Court.

[2] The term "multi-employer collective bargaining" is used generically in this context to include "coordinated" or "coalition" bargaining where employers bargain together but individually execute the resulting collective bargaining agreement, as well as true multi-employer bargaining where employers negotiate as part of a single collective bargaining unit and sign a single agreement.

bargaining. By permitting arbitrators to routinely formulate and design, for individual companies, new terms and conditions of employment on "local issues" through unconsented interest arbitration, the Court of Appeals decision will discourage continued participation in multi-employer bargaining. The prospect of such a development is of concern to the ABA because of its adverse impact on industry labor relations stability.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Will Destabilize Labor Relations In Industries With A Tradition Of Multi-Employer Bargaining

The Petition for a Writ of Certiorari should be granted because the deicision of the Court of Appeals will create serious disincentives to continued participation in multi-employer collective bargaining relationships.

In a number of industries, including the baking industry, groups of employers and the union or unions representing their employees have agreed to participate in multi-employer or coordinated collective bargaining in order to meet their bargaining obligations under the National Labor Relations Act.[3] In a 1980 survey of major collective bargaining agreements (those covering 1,000 or more employees), it was determined that 40% were multi-employer agreements and that over 43% of the organized

[3] Under the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 151 *et seq.* (1976), when a labor orgnization is certified or recognized as the collective bargaining representative of a group of employees, the employer has an obligation to engage in collective bargaining negotiations in order to reach an agreement with the union.

work force was covered by multi-employer collective bargaining agreements.[4]

The multi-employer bargaining structure varies greatly. It may consist of a group of local, regional or national employers bargaining together, or through an association that represents the group as a single bargaining unit. It can be highly organized, or amount to no more than a loose federation of employers who bargain as an informal group or simply through an agreed-upon spokesman.

Multi-employer bargaining in the baking industry exists in two ways. With regard to production workers, multi-employer agreements are negotiated on a regional pattern-setting basis covering a major portion of the country. These agreements bind the employers that are part of the multi-employer group and also set the pattern for individual employer negotiations that usually follow the pattern. With regard to non-production workers, multi-employer agreements are negotiated on a local area basis involving the companies which are dominant in that geographical location. Again, these patterns exercise an influence over later agreements negotiated in nearby geographic areas. The net result is that the industry as a whole is influenced and led by the terms and conditions of multi-employer agreements.

Multi-employer bargaining exists on a national scale in many other industries, such as railroad, coal, steel and trucking. In those industries, agreements are negotiated covering thousands of workers and involving millions of

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[4] Bureau of Labor Statistics, U.S. Department of Labor, Bull. No. 2095, *Characteristics of Major Collective Bargaining Agreements—January 1, 1980,* at p. 19, Table 1.8 (1981).

dollars. Further, in the construction and service industries, it is very common for small employers to join together in bargaining with the union or unions representing their employees.

Considering the wide proliferation of multi-employer agreements, it is no wonder that the Court has noted that:

> [B]y permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multi-employer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife.

Charles D. Bonanno Linen Services v. *NLRB*, 454 U.S. 404, 409 n.3 (1982).

The Court should grant the Petition because the decision of the Court of Appeals will have a chilling effect on the willingness of employers to engage in multi-employer collective bargaining. The Court of Appeals decision endorses an arbitrator's interest arbitration award even though the parties never agreed to an interest arbitration procedure in the collective bargaining agreement. The decision rationalizes this result on the basis that the parties' multi-employer bargaining structure purportedly could not address so-called local disputes at the table. We submit that rather than having multi-employer labor agreements misinterpreted as delegating the establishment or modification of terms and conditions of employment to an arbitrator, the parties will be inclined to dissolve the consensual multi-employer collective bargaining relationships and revert to single employer-union collective bargaining.

This basic alteration in traditional collective bargaining structures will have an inherently destabilizing effect on labor management relations in this industry. The

proliferation of individual collective bargaining negotiations will complicate labor relations and likely increase the number of strikes and lockouts. The destablization of multi-employer bargaining is directly contrary to national labor policy. The National Labor Relations Board has expressly stated that national labor policy requires the preservation of multi-employer bargaining patterns, *Retail Associates*, 120 NLRB 388, 393-5 (1958), and this Court has deferred to the Board's expertise in protecting multi-employer bargaining. *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 93-6 (1957); *Charles D. Bonanno Linen Services* v. *NLRB*, *supra*.

These pessimistic predictions concerning the impact of the Court of Appeals decision become realistic on analysis.

II. The Court Of Appeals Opinion Fundamentally Misapplies The Court's Decisions Defining The Proper Role Of Arbitration Under Federal Labor Policy

There are two generic types of labor arbitration: "rights arbitrations" in which the arbitrator resolves a dispute over the interpretation or application of a collective bargaining agreement or customary practice; and "interest arbitrations" in which the arbitrator actually formulates one or more terms and conditions of employment. *See*, F. Elkouri, HOW ARBITRATION WORKS (1973). *See also Local 344 Leather Goods Union* v. *Singer Co.*, 478 F.Supp. 441, 443 n.5 (N.D.Ill. 1979). These two forms of arbitration have fundamentally different roles in national labor policy. As Professor Elkouri states:

> Disputes as to "rights" are adjudicable under the laws or agreements on which the rights are based and are readily adaptable to settlement by arbitration. Disputes as to interests, on the other hand, involve questions of policy which, for lack of prede-

> termined standards, are not generally regarded as justiciable or arbitrable.

Elkouri, *supra* at 48.

This distinction between *rights* and *interests* arbitration is manifest in labor legislation. Section 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d) speaks to arbitration as the "desirable method for settlement of disputes *arising over the application or interpretation of an existing collective bargaining agreement.*"—a clear reference to rights arbitration.

The Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which in many respects was the prototype for the National Labor Relations Act, provides for two arbitration procedures: one to resolve "rights" or "minor" disputes, 45 U.S.C. § 153, and another to resolve "interests" or "major" disputes. 45 U.S.C. § 157; *see, Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945). Most significantly, under the Railway Labor Act, use of the "rights" arbitration procedure is mandatory and "interests" arbitration is purely voluntary. *See, Brotherhood of Railroad Trainmen* v. *Chicago, R. & I.R.*, 353 U.S. 30 (1957).

The voluntary character of interest arbitration results from its extremely limited role in private sector labor management relations. Reduced to its essence, interest arbitration supplants or replaces collective bargaining as the means for establishing terms and conditions of employment. It is an extremely rare phenomenon in private sector collecive bargaining agreements. C. Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA (1976).[5] Indeed, labor policy in the United States is

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[5] The Bureau of Labor Statistics, U.S. Department of Labor, Bulletin No. 1425-6, *Arbitration Procedures*, (1966), reports that "only

based on the centrality of collective bargaining as the procedure for establishing terms and conditions of employment. NLRA §§ 1, 201; 29 U.S.C. §§ 151, 171.

Obviously, an employer and a union can agree to interest arbitration, and when they do, that agreement should be effectuated. However, there is no strong labor policy favoring interest arbitration. As Elkouri says:

> Indiscriminate use of 'interests' arbitration is to be avoided, for such use may impede healthy development of the labor-management relationship. In particular, parties who abdicate to arbitrators the responsibility for writing the bulk of the collective bargaining agreement risk serious disappointment.
>
> Leaving too many 'interests' issues to be resolved by neutrals has been severely criticized by the neutrals themselves and has produced some pronounced disappointments of dispute settlement efforts.

Elkouri, *supra* at 53.

In contrast, "rights" arbitrations, involving the settlement of disputes arising over the application or interpretation of existing agreements or established practices is an integral aspect of the labor relations environment.[6]

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about two percent of major collective bargaining agreements provide for arbitration over terms of new contracts." *cited in Mechanical Contractors Ass'n*, 202 NLRB 1, 12-13 (1973).

[6] A BLS survey of collective bargaining agreements covering 1,000 or more employees reflects that 1,496 agreements out of 1,550 surveyed had grievance and arbitration procedures. Bureau of Labor Statistics, *supra* n.4. The frequency of grievance and arbitration procedures in collective bargaining agreements is consistent with § 203(d) of the NLRA as well as the mandatory "rights" grievance procedure contained in the Railway Labor Act.

The decisions of the Supreme Court in the *Steelworker Trilogy* cases,[7] upon which the Sixth Circuit relied, all relate to the desirability of "rights" arbitrations to determine disputes regarding the interpretation or application of the collective bargaining agreement.

The Court of Appeals' decision, however, does not concern a rights arbitration, but rather an interest arbitration. The Court of Appeals endorsed an arbitrator's exercise of interest arbitration jurisdiction even though there was no interest arbitration provision in the collective bargaining agreement between ITT Continental and Teamsters Local No. 51.[8] The union filed a grievance requesting the arbitrator to formulate a new collection and deposit procedure which would be operative at the Company's Detroit distribution facility. Disregarding over twenty years of past practice under the existing contract, the arbitrator concluded that he had authority to invalidate the existing procedure and draft a new one. He did this even though there was no language in the contract or in an arbitral submission agreement which authorized him to formulate new terms and conditions of employment for the parties.

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[7] *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564 (1960); *United States Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[8] There can be no dispute here that the arbitrator exercised interest arbitration jurisdiction. In his award (P. App. E-9), Arbitrator Dworkin wrote:

> The grievance is in the nature of an interest dispute and is properly before the arbitrator for determination on the merits.

We submit that the Court of Appeals has totally misapplied the Court's precedent by failing to differentiate between "rights" and "interest" arbitration. This Court has never applied the *Steelworkers Trilogy* analysis to interest arbitration, and other Circuit Courts have recognized the difficulty of attempting to do so. *See e.g., Laundry, Dry Clean & D. H. Wkrs. Int. U., Local 93* v. *Mahoney*, 491 F.2d 1029 (8th Cir. 1974) *cert. denied* 419 U.S. 825 (1975). The Sixth Circuit has improperly applied the federal labor policy favoring "rights" arbitration to a union demand for "interest" arbitration. The court held, in effect, that an arbitrator may establish or modify a term or condition of employment when established practice is challenged by a union under a general arbitration provision. There is no case law which supports such a presumption that interest arbitration is authorized by a labor agreement simply because parties negotiate collectively or in a coalition. An agreement to engage in interest arbitration should not be presumed: because of its significance as a substitute for collective bargaining, an agreement to submit a dispute to interest arbitration must be express. *See Aluminum Co. of America v. International U.*, 630 F.2d 1340 (9th Cir. 1980); *Oil, Chemical & Atomic Workers* v. *Shell Oil*, 555 F.Supp. 142 (S.D.Tex. 1982). *Contra Nashville News P.P.U., L.50* v. *Newspaper Print Corp.*, 399 F.Supp. 593 (M.D. Tenn. 1974), *aff'd* 518 F.2d 351 (6th Cir. 1975).

Moreover, a presumption that the parties to a bargaining relationship intend to establish or modify terms and conditions of employment by arbitration rather than collective bargaining is not supported by the National Labor Relations Act. Indeed, just the opposite is the case. The Act endorses collective negotiations which must be conducted in good faith. The Act does not require the parties to reach agreement, nor does it authorize an independent

agency (either the National Labor Relations Board or the Federal Mediation and Conciliation Service) to fashion an agreement against the parties' will. The Act fulfills its objective by policing the manner in which collective bargaining occurs. The parties' relative economic strength and bargaining priorities determine the results. The underlying premise of the Court of Appeals' decision, however, turns the philosophy of the NLRA "on its head." It holds that simply because the parties have bargained in a multi-employer context, the arbitrator has more authority (than he otherwise would) to resolve local disputes by formulating new terms and conditions of employment under the guise of "rights arbitration."

Our criticism of the Court of Appeals decision is not intended to suggest that the parties could not agree to "interest" arbitration and that such an agreement could not be judicially enforced. *See Winston-Salem Printing Press* v. *Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968). Rather, our criticism focuses on the Court's far-reaching application of a labor policy assumption that presumes the parties have agreed to interest arbitration simply because the structure of collective negotiations occurs in a multi-employer bargaining context. The Court of Appeals' presumption is wholly inappropriate in light of consistent NLRB and court precedent holding that a collective bargaining proposal to establish or modify a term or condition of employment by interest arbitration is not a mandatory subject of bargaining over which the union can strike or the employer lock out. *See, NLRB* v. *The Columbus Printing Pressmen and Assistants' Union No. 252*, 543 F.2d 1162, 1166 (5th Cir. 1976); *Milwaukee Newspaper and Graphic Communications Union, Local No. 23* v. *Newspapers, Inc.*, 586 F.2d 19 (7th Cir. 1978) (and cases cited therein).

Interest arbitration does not enjoy a preferential status under the NLRA or other court or Board precedent. To introduce a presumption of interest arbitration into the administration of multi-employer contracts will create a signficant disincentive to continued participation in that common form of collective bargaining. An employer continually will be at risk of a union grievance, such as the one filed in this case, asking an arbitrator to modify any one of the many terms and conditions of employment that have been established by practice rather than agreement at the local level. The court's approach will substitute interest arbitration for collective bargaining and involuntarily delegate to a third-party arbitrator the task of reformulating terms and conditions of employment.

If the cost of participating in multi-employer bargaining is a presumptive expansion of the scope of a rights arbitration procedure to include disputes over the formation or modification of terms and conditions of employment, employers will be inclined to abandon multi-employer bargaining in favor of bilateral collective bargaining. As a result, the collective bargaining patterns that evolved through the years and have achieved a measure of labor relations stability in this industry will be disrupted, in conflict with national labor policy, and to the prejudice of employers, unions, employees and the public.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari in this case to reaffirm the primacy of collective bargaining in national labor policy and to correct the Court of Appeals' misapplication of the Court's important decisions in the *Steelworker Trilogy*.

Respectfully submitted,

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